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No. 91-1285

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1991

COLORADO LIBERTARIAN PARTY and ROBIN HEID,
Petitioners,
vs.
SECRETARY OF STATE OF COLORADO, Natalie Meyer in her official capacity and not individually,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COLORADO SUPREME COURT

Colorado Supreme Court
Case No. 90SA382

GALE A. NORTON*
Attorney General
RAYMOND T. SLAUGHTER
Chief Deputy Attorney General
TIMOTHY M. TYMKOVICH
Solicitor General
MAURICE G. KNAIZER
Deputy Attorney General
General Legal Services Section
Attorneys for Respondent
110 Sixteenth St., 10th Floor
Denver, Colorado 80202
Telephone: (303) 620-4610
***Counsel of Record**

QUESTIONS PRESENTED FOR REVIEW

1. Whether under the First Amendment Colorado may prohibit an independent candidate from running as a nominee for an entity which is not a party if that person is a registered member of a political party and was rejected as a candidate by the political party?

2. Whether Colorado's requirement that a person who intends to be a candidate for nomination of a political party or a political organization must be registered with the appropriate public official as a member of that political party or organization constitutes a denial of equal protection?

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Respondent Colorado Secretary of State Natalie Meyer urges the Court not to grant the petition for certiorari in this matter.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment 1 to the United States Constitution states in part:

> Congress shall make no law ... abridging the freedom of speech ... or the right of the people peaceably to assemble, and to petition the

Government for a redress of grievances.

Amendment 14 to the United States Constitution provides, in part:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Colo. Rev. Stat. § 1-4-601 (1991 Supp.) provides, in part:

> (1) Assemblies of the several political parties may make assembly designations of candidates for nomination on the primary election ballot....
>
> (2) ... The certificate of designation by assembly shall state the name of the office for which each person is a candidate and his name and address, and shall designate in not more than three words the name of the political party which the candidate represents, and shall certify that the candidate has been a member of said political party for the period of time required by rule of the candidate's political party or by law if the party has no such rule, as shown on the registration books of the county clerk and recorder.
>
> (4)(a) No person shall be eligible for designation by assembly as a candidate for nomination at any primary election unless such person has been affiliated with the political party holding the assembly for a period of at least twelve months

> immediately preceding the date of the assembly, as shown by the registration books of the county clerk and recorder.

Colo. Rev. Stat. § 1-4-801(1)(i) (1980) provides in part:

> No person shall be placed in nomination by petition unless the person ... was registered as unaffiliated, as shown on the books of the county clerk and recorder, for at least twelve months prior to the date of filing of the petition.

STATEMENT OF THE CASE AND FACTS

Petitioners fail to mention crucial facts which are pertinent to this petition.

Colorado law differentiates between a political party, a political organization and a qualified political organization. The Colorado Libertarian Party (hereinafter "CLP") is a "qualified political organization." A qualified political organization is one which has placed on the ballot at a congressional vacancy or general election a candidate for district or state office and which meets certain other procedural requirements. Rule 16.1, 8 Colo. Code Regs. § 1505-1 (1984) (Petitioners' App. 59). *See Baer v. Meyer*, 728 F.2d 471, 475-76 (10th Cir. 1984).

A "political organization" is defined by statute as "any group of registered electors who, by petition for nomination of an independent candidate as provided in Colo. Rev. Stat. § 1-4-801 (1980), places upon the official general election ballot nominees for public office." Colo. Rev. Stat. § 1-1-104(17) (1980).

A "political party" is defined as "any political organization which at the last preceding gubernatorial election was represented on the official ballot either by regular party candidates or by individual nominees only if it cast for its gubernatorial candidate at least ten percent of the total gubernatorial vote cast in the state at such election." Colo. Rev. Stat. § 1-1-104(18) (1980). Political parties are not required to circulate petitions to place their candidates on the ballot.

A person who is a candidate for public office on behalf of a political party must be registered as a member of that party with the appropriate election officer for the period of time established by party rule, or if the party does not have such a rule, for a period of twelve months preceding the date of the party's assembly. Colo. Rev. Stat. § 1-4-601(2) and (4)(a) (1991 Supp.). A candidate who is nominated on behalf of a political organization must be registered as unaffiliated for a period of twelve months prior to the date of filing of his nominating petition. Colo. Rev. Stat. § 1-4-801(1)(i) (1980).

A candidate who is nominated on behalf of a "qualified political organization" must be registered as unaffiliated or as a member of his qualified political organization for a period of twelve months prior to the date of filing his nominating petition. Rule 16.6, 8 Colo. Code Regs. § 1505-1 (1984) (Petition for Certiorari, App. 60). The Colorado nomination process is described in more detail in the Colorado Supreme Court's decision below (Petition for Certiorari, App. A).

Petitioner Robin Heid (hereinafter "Heid") has been a registered Republican since April 25, 1980. On May 27, 1988, he paid a $25 membership fee to join the CLP. Pursuant to CLP procedures, the fee entitled Heid to membership in the CLP for one year. He did not alter his voter registration. In 1988, Heid circulated a petition for nomination as the CLP candidate in

Colorado's First Congressional District. He did not receive the minimum number of signatures required to place him on the ballot.

In December 1989, Heid met with the directors of the CLP. They agreed that Heid would run for the governorship on behalf of the CLP. Heid asked the CLP to draft him rather than have him solicit the nomination of the CLP so that it would "look better to the Republicans" (App. A).

In March 1990, the Communications Director of the CLP stated in a party newsletter that Heid decided to run for the Republican nomination for governor. Heid and the CLP reasoned that, at a minimum, his candidacy for the Republican nomination would garner more publicity for his Libertarian gubernatorial candidacy. If he gained the Republican nomination, he would run as Libertarian-Republican. By running Heid as a Libertarian-Republican, the CLP hoped to obtain political party status by garnering at least ten percent of the votes in the gubernatorial race (Apps. B and C).

On April 21, 1990, Heid again paid his $25 membership. On the same day, he became the 1990 gubernatorial nominee for the CLP. He remained a registered Republican. He did not register as a Libertarian or as unaffiliated. On June 9, 1990, Heid allowed his name to be placed in nomination as the Republican candidate for governor. Votes were tallied on his behalf, but before the vote totals were announced, Heid committed his vote to John Andrews, the eventual Republican gubernatorial nominee.

On or about June 23, 1990, Heid commenced circulating his petition for nomination as the Libertarian gubernatorial candidate. Heid obtained sufficient signatures to have his name placed on the ballot. Heid submitted his petition to the Secretary of State who rejected the petitions on the ground that Heid had been registered as a Republican rather than as a Libertarian or as unaffiliated for

twelve months prior to the filing of the petition. The Secretary did allow the CLP to substitute another gubernatorial candidate.

REASONS WHY THE PETITION FOR CERTIORARI SHOULD BE DENIED

Heid and the CLP have failed to establish that the issues are worthy of consideration by this Court. The decision below is in full accord with applicable constitutional standards; the result is fair and accurate; and the facts are unique.

A. The Colorado Supreme Court Correctly Applied the Standards of This Court to a Quintessential Attempt to Create Disorder and Confusion in the Political Process.

The decision reached by the Colorado Supreme Court comports with prior decisions by this Court. Contrary to their contention, the Colorado Supreme Court applied the appropriate test. Citing *Anderson v. Celebrezze*, 460 U.S. 780 (1983), the Colorado Supreme Court found that it must consider the legitimacy and strength of the state's interest and the extent to which the state's interests are "necessary" to burden the petitioners' rights. *Colorado Libertarian Party v. Secretary of State*, 817 P.2d 998, 1001-1002 (Colo. 1991). It concluded that the requirement that a candidate on behalf of a political organization must be registered as unaffiliated or as a member of that organization does not unnecessarily burden petitioners' rights.

Colorado's requirements assure that one political entity cannot undermine the nomination process of a competing entity or

confuse the public. *Tashjian v. Republican Party*, 479 U.S. 208, 224-25 n.13 (1986); *Storer v. Brown*, 415 U.S. 724 (1974). The facts of this case bear witness to the need for the requirements. Almost a year before the election, the CLP and Heid intended to deceive the Republican Party. Unbeknownst to the Republican Party, the CLP and Heid hoped to gain publicity and political capital by participating in the Republican nomination process. They also hoped to confuse the public about Heid's party affiliation in order to obtain the number of votes necessary to qualify the CLP as a political party (Apps. B and C).

Despite the protestations of Heid and the CLP to the contrary, the CLP is only a group of individuals who may register as members of the CLP and who may place independent candidates on the ballot by petition. *Baer v. Meyer, supra*. Because the case involves access to the ballot of an independent candidate who is presently affiliated with a major political party, the legitimacy of the twelve-month disaffiliation requirement is governed by *Storer v. Brown, supra*. The *Storer* court sustained a twelve-month disaffiliation requirement to prevent a party from "fielding an independent candidate to capture and bleed off votes in the general election that might well go to another party." *Id.* 735. *See also Rosario v. Rockefeller*, 410 U.S. 752 (1973).

B. Colorado Requires That Candidates of Both Political Parties and Political Organizations Be Registered as Members Thereof.

The CLP and Heid claim that the Colorado Supreme Court's decision "creates an unreasoned distinction between the constitutional rights of major and minor political parties (Petition for Writ of Certiorari, p. 12).

Petitioners' argument contains two fundamental errors. First, the CLP is not a minor political party. A minor political party must have attained at least ten percent of the total vote cast in the last gubernatorial election. Colo. Rev. Stat. § 1-1-104(16) and (18) (1980). Instead, the CLP is a qualified political organization because it has not been able to attain the minimum number of votes to qualify as a minor party.

Second, the CLP and Heid were not treated differently from political parties. Under Colorado law, neither a political party nor a political organization can offer a person for nomination unless that person is formally registered as a member of that party or organization. Colo. Rev. Stat. § 1-4-601(2) (1991 Supp.) and Colo. Rev. Stat. § 1-4-801(1)(i) (1980). Thus, a registered Democrat cannot become a Republican candidate for nomination in the Republican primary. Similarly, Heid's petition was rejected because he was a registered Republican who wished to run under the Libertarian banner.

C. Courts in Other Jurisdictions Have Sustained Similar Requirements.

The Colorado Supreme Court's decision is consistent with the decisions of courts in other jurisdictions. In *Thournir v. Meyer*, 708 F. Supp. 1183 (D. Colo. 1989), *aff'd.*, 909 F.2d 408 (10th Cir. 1990), the Court sustained the constitutionality of § 1-4-801(1)(i) against a challenge by a member of the Socialist Workers Party. The Court concluded that the twelve-month disaffiliation requirement works to prohibit independent candidates who seek to bleed off votes in a general election that might otherwise go to a particular major party candidate. *Thournir*, 708 F. Supp. at 1187. *See also Anderson v. Hooper*, 632 F.2d 116 (10th Cir. 1980).

The Oklahoma Supreme Court has sustained a statute similar to § 1-4-801(1)(i). *Davis v. State Election Board of Oklahoma*, 762 P.2d 932 (Okla. 1988). Oklahoma law required an independent candidate to be registered as an independent for a six-month period immediately preceding the first day of the filing period. The Oklahoma Supreme Court stated that the challenged provision provided an objective manifestation of the person's status as an independent candidate.

CONCLUSION

The Court should deny the petition for certiorari.

GALE A. NORTON*
Attorney General

RAYMOND T. SLAUGHTER
Chief Deputy Attorney General

TIMOTHY M. TYMKOVICH
Solicitor General

MAURICE G. KNAIZER, 5264
Deputy Attorney General
General Legal Services Section

Attorneys for Respondent

110 Sixteenth St., 10th Floor
Denver, Colorado 80202
Telephone: (303) 620-4610
*Counsel of Record

APPENDIX A

Colorado Libertarian Party
Board of Directors
Minutes from December 9, 1989

....

Robin Heid's comments:

Heid wants to be drafted for the LP slot in the Governor 1990 race. He is also trying for the Republican nomination -- being "drafted" by the LP will look better to the Republicans than having apparently sought the LP nomination.

A VP candidate once had both Democratic and Republican nominations, so a joint LP/RP nomination is not impossible.

LP nomination lets him run even without the Republican nomination. His primary issue is ending the war on drugs.

Pro-2nd amendment people are mad at the Republicans, drug legalization proponents are mad at the Democrats -- this is the audience Heid wants to appeal to.

Heid says he has name recognition as well as talent at getting media attention. He is asking for our nomination, and for us to collect the necessary signatures, in return for which he feels confident he can bring in 10% of the vote. Jon Baraga claims 500-1000 signatures are needed for the Governors race -- we would have 6 weeks starting about the 23rd of June.

To get both nominations, Heid claims being a registered Republican and a paid Liberarian [sic] would satisfy both parties' requirements.

APPENDIX B

Excerpt from
COLORADO LIBERTARIAN PARTY CLIPBOARD
"Let's draft Robin Heid for guv!"
March 1990 Article By:
Noah Brodbeck
Official Publication of the
Colorado Libertarian Party
720 E. 18th Ave., Suite #309
Denver, CO 80203
(303) 837-9393

Robin Heid, political gadfly and former Libertarian statehouse candidate, has formally announced his candidacy for the Republican nomination for Governor. And he's serious, quite serious.

....

No need to worry, Robin is still Libertarian as ever, fervent about stopping this frontal assault on our human rights and civil liberties. That's good, had me worried for a minute. But why Republican? The answer is obvious: No self-respecting straight Republican wishes to be the sacrificial cow for the Democrats to slay this election. Robin realized that, and took that big leap into the ring, garnering more publicity in one shot than any Libertarian I can think of, even Ron Paul when he was here on his Presidential tour.

After talking to other Libertarians, a consensus formed, one that certainly holds promise for all of us. Let's begin a campaign to draft Robin Heid as the Libertarian candidate for Governor. The benefits should be apparent to everyone: Robin

has already been publicized; it should bring our argument on the War on Drugs to the forefront of the debate, and I think we could actually see a 15 to 30% voter return for our Libertarian-Republican candidate. It only takes 10% for the state to consider us a real party.

APPENDIX C

DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO

Case No. 90CV9486, Courtroom 6

REPORTER'S TRANSCRIPT

COLORADO LIBERTARIAN PARTY AND ROBIN HEID,

Petitioners,

v.

SECRETARY OF STATE OF COLORADO, NATALIE MEYER, in her official capacity and not individually,

Respondent.

....

MS. PAGE: Your Honor, I would like to call Noah Broadbeck to the stand.

THE COURT: All right. Raise your right hand.

(Witness sworn.)

WITNESS: Yes, sir.

THE COURT: Thank you.

NOAH BRODBECK

called by Petitioners, having been duly sworn upon his oath, testified and was examined as hereinafter follows:

DIRECT EXAMINATION

BY MS. PAGE:

Q Could you state your name, please?

A Noah Brodbeck.

Q Could you spell your name for the record?

A N-O-A-H B-R-O-D-B-E-C-K.

Q Could you tell us what affiliation you have with the Colorado Libertarian Party?

THE COURT: Wait a minute. Would you please get behind the roster?

MS. PAGE: Excuse me, Your Honor.

THE COURT: If you don't use the roster, we get to talking too low, and then nobody can hear.

A I currently am unaffiliated with the Colorado Libertarian Party.

Q (By Ms. Page) Were you ever affiliated with the Colorado Libertarian Party?

A Yes, I was. I am a former Communications Director for the Colorado Libertarian Party and sat on the board.

Q Did you write an article in March of 1990 that appeared in the Colorado Libertarian Clipboard?

A Yes, I did.

Q In that article you made some statements about drafting Robin Heid as a candidate?

A Yes, ma'am.

Q Could you explain what you meant when you stated that Robin Heid would be good for the Libertarian Party?

A Can I see the article that you're referring to?

THE COURT: Do I have it here?

MS. PAGE: Yes, Your Honor. Thank you.

THE COURT: Would you mark that if you're going to refer to it?

MS. PAGE: Yes, Your Honor. This has been marked as Plaintiffs' Exhibit H.

Q (By Ms. Page) I hand you what has been marked as Plaintiffs' Exhibit H.

A All right. Which section?

Q In the third column, the full paragraph. Would you read that?

A After talking?

Q (Nodded head.)

A "After talking to other Libertarians, a consensus formed, one that certainly holds promise for all of us. Let's begin a campaign to draft Robin Heid as the Libertarian candidate for Governor. The benefits should be apparent to everyone. Robin has already been publicized. It should bring our argument on the war on drugs to the forefront of the debate, and I think we could actually see a 15 to 30% voter return for our Libertarian-Republican candidate. It only takes 10% for the state to consider us a real party."

Q What did you mean by Libertarian-Republican candidate?

A Libertarian-Republican candidate? Well, if the Republicans nominated him, he would be running as a Republican; and if we nominated him, he would be running as a Libertarian. So that hopefully we could get all the Republicans to -- well, Republicans vote for Republicans, so we could get them to vote for our candidate.

Q Okay. But you didn't mean that he would be a Libertarian candidate?

A Everybody --

THE COURT: Wait a minute. Don't you be telling him what he meant in the article.

MS. PAGE: Okay.

A No. I would hope that we could persuade Republicans to vote Libertarian. That's the idea. But if we ran

him in both parties, then we would have both members of both the parties being able to vote for him.

MS. PAGE: Thank you.

CROSS-EXAMINATION

BY MR. KNAIZER:

Q You would not admit, Mr. Brodbeck, that it would create some confusion for some of the voters to have somebody running as both a Libertarian and a Republican?

A Confusion?

Q Sure. They wouldn't know whether they're voting for a Republican or Libertarian, would they?

A Well, I assume that they might get two lines on the ballot.

Q Oh. So people could then vote for him twice if he gets two lines?

A I have no idea how elections -- I don't know. I assume if they nominated him as a Republican, he would then get a Republican slide. If he was nominated as a Libertarian, he would get a Libertarian slide.

Q And as a Libertarian, has anybody ever received 10% of the vote before in the state of Colorado to your knowledge?

A No.

Q Okay. And why did you -- why do you think then

that he would get a 15 to 30% voter return if he ran as a Libertarian-Republican?

A I wrote for a political newsletter. I don't necessarily have to say things that are entirely true. I attempt to drum up support within my party to hope that maybe we can get 30% of the vote and, therefore, persuade more people to vote.

Q So you don't necessarily say things that are true, is that correct?

A No, not always; not when I'm attempting to politically propagandize.

MR. KNAIZER: Thank you. That's all that I have.